

ENVIRONMENTAL QUALITY

CHAPTER 4

PROCEDURAL RULES

Sub-Chapter 6

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Sub-Chapter 6

Montana Environmental Policy Act

17.4.601 POLICY (1) The purpose of these rules is to implement Title 75, chapter 1, MCA, the Montana Environmental Policy Act (MEPA), through the establishment of administrative procedures. In order to fulfill the stated policy of that act, the department of environmental quality shall conform to the following rules prior to reaching a final decision on actions covered by MEPA. It must be noted that the act requires that state agencies comply with its terms "to the fullest extent possible." (History: 2-4-201, 2-15-112, MCA; IMP, 75-1-201, MCA; NEW, 1980 MAR p. 88, Eff. 1/18/80; TRANS, from DHES, 1996 MAR p. 1497.)

17.4.602 POLICY STATEMENT CONCERNING MEPA RULES (1) The purpose of these rules is to implement Title 75, chapter 1, MCA, the Montana Environmental Policy Act (MEPA), through the establishment of administrative procedures. MEPA requires that state agencies comply with its terms "to the fullest extent possible." In order to fulfill the stated policy of that act, the agency shall conform to the following rules prior to reaching a final decision on proposed actions covered by MEPA. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

17.4.603 DEFINITIONS (1) "Action" means a project, program or activity directly undertaken by the agency; a project or activity supported through a contract, grant, subsidy, loan or other form of funding assistance from the agency, either singly or in combination with 1 or more other state agencies; or a project or activity involving the issuance of a lease, permit, license, certificate, or other entitlement for use or permission to act by the agency, either singly or in combination with other state agencies.

(2)(a) "Alternative" means:

(i) an alternate approach or course of action that would appreciably accomplish the same objectives or results as the proposed action;

(ii) design parameters, mitigation, or controls other than those incorporated into a proposed action by an applicant or by an agency prior to preparation of an EA or draft EIS;

(iii) no action or denial; and

(iv) for agency-initiated actions, a different program or series of activities that would accomplish other objectives or a different use of resources than the proposed program or series of activities.

(b) The agency is required to consider only alternatives that are realistic, technologically available, and that represent a course of action that bears a logical relationship to the proposal being evaluated.

(3) "The agency" means the department of environmental quality and the board of environmental review.

(4) "Applicant" means a person or any other entity who applies to the agency for a grant, loan, subsidy, or other funding assistance, or for a lease, permit, license, certificate, or other entitlement for use or permission to act.

(5) "Categorical exclusion" refers to a type of action which does not individually, collectively, or cumulatively require an EA or EIS, as determined by rulemaking or programmatic review adopted by the agency, unless extraordinary circumstances, as defined by rulemaking or programmatic review, occur.

(6) "Compensation" means the replacement or provision of substitute resources or environments to offset an impact on the quality of the human environment. The agency may not consider compensation for purposes of determining the significance of impacts (see ARM 17.4.607(4)).

(7) "Cumulative impact" means the collective impacts on the human environment of the proposed action when considered in conjunction with other past and present actions related to the proposed action by location or generic type. Related future actions must also be considered when these actions are under concurrent consideration by any state agency through preimpact statement studies, separate impact statement evaluation, or permit processing procedures.

(8) "Emergency actions" include, but are not limited to:

(a) projects undertaken, carried out, or approved by the agency to repair or restore property or facilities damaged or destroyed as a result of a disaster when a disaster has been declared by the governor or other appropriate government entity;

(b) emergency repairs to public service facilities necessary to maintain service; and

(c) projects, whether public or private, undertaken to prevent or mitigate immediate threats to public health, safety, welfare, or the environment.

(9) "Environmental assessment" (EA) means a written analysis of a proposed action to determine whether an EIS is required or to serve 1 or more of the other purposes described in ARM 17.4.607(2).

(10) "Environmental impact statement" (EIS) means the detailed written statement required by 75-1-201, MCA, which may take several forms:

(a) "draft environmental impact statement" means a detailed written statement prepared to the fullest extent possible in accordance with 75-1-201(1)(b)(iii), MCA, and these rules;

(b) "final environmental impact statement" means a written statement prepared to the fullest extent possible in accordance with 75-1-201, MCA, and ARM 17.4.618 or 17.4.619 and which responds to substantive comments received on the draft environmental impact statement;

(c) "joint environmental impact statement" means an EIS prepared jointly by more than one agency, either state or federal, when the agencies are involved in the same or a closely related proposed action.

(11) "Environmental quality council" (EQC) means the council established pursuant to Title 75, chapter 1, MCA, and 5-16-101, MCA.

(12) "Human environment" includes, but is not limited to biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment. As the term applies to the agency's determination of whether an EIS is necessary (see ARM 17.4.607(1)), economic and social impacts do not by themselves require an EIS. However, whenever an EIS is prepared, economic and social impacts and their relationship to biological, physical, cultural and aesthetic impacts must be discussed.

(13) "Lead agency" means the state agency that has primary authority for committing the government to a course of action or the agency designated by the governor to supervise the preparation of a joint environmental impact statement or environmental assessment.

(14) "Mitigation" means:

(a) avoiding an impact by not taking a certain action or parts of an action;

(b) minimizing impacts by limiting the degree or magnitude of an action and its implementation;

(c) rectifying an impact by repairing, rehabilitating, or restoring the affected environment; or

(d) reducing or eliminating an impact over time by preservation and maintenance operations during the life of an action or the time period thereafter that an impact continues.

(15) "Programmatic review" means an analysis (EIS or EA) of the impacts on the quality of the human environment of related actions, programs, or policies.

(16) "Residual impact" means an impact that is not eliminated by mitigation.

(17) "Scope" means the range of reasonable alternatives,

mitigation, issues, and potential impacts to be considered in an environmental assessment or an environmental impact statement.

(18) "Secondary impact" means a further impact to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action.

(19) "State agency", means an office, commission, committee, board, department, council, division, bureau, or section of the executive branch of state government. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

Rules 17.4.604 through 17.4.606 reserved

17.4.607 GENERAL REQUIREMENTS OF THE ENVIRONMENTAL REVIEW PROCESS Section 75-1-201, MCA, requires state agencies to integrate use of the natural and social sciences and the environmental design arts in planning and in decisionmaking, and to prepare a detailed statement (an EIS) on each proposal for projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment. In order to determine the level of environmental review for each proposed action that is necessary to comply with 75-1-201, MCA, the agency shall apply the following criteria:

- (1) The agency shall prepare an EIS as follows:
 - (a) whenever an EA indicates that an EIS is necessary; or
 - (b) whenever, based on the criteria in ARM 17.4.608, the proposed action is a major action of state government significantly affecting the quality of the human environment.
- (2) An EA may serve any of the following purposes:
 - (a) to ensure that the agency uses the natural and social sciences and the environmental design arts in planning and decision-making. An EA may be used independently or in conjunction with other agency planning and decision-making procedures;
 - (b) to assist in the evaluation of reasonable alternatives and the development of conditions, stipulations or modifications to be made a part of a proposed action;
 - (c) to determine the need to prepare an EIS through an initial evaluation and determination of the significance of impacts associated with a proposed action;
 - (d) to ensure the fullest appropriate opportunity for public review and comment on proposed actions, including alternatives and planned mitigation, where the residual impacts do not warrant the preparation of an EIS; and
 - (e) to examine and document the effects of a proposed action on the quality of the human environment, and to provide the basis for public review and comment, whenever statutory requirements do not allow sufficient time for an agency to prepare an EIS. The agency shall determine whether sufficient time is available to prepare an EIS by comparing statutory requirements that establish when the agency must make its decision on the proposed action with the time required by ARM 17.4.620 to obtain public review of an EIS plus a reasonable period to prepare a draft EIS and, if required, a final EIS.
- (3) The agency shall prepare an EA whenever:
 - (a) the action is not excluded under (5) of this rule and it is not clear without preparation of an EA whether the proposed action is a major one significantly affecting the quality of the human environment;
 - (b) the action is not excluded under (5) of this rule and although an EIS is not warranted, the agency has not otherwise implemented the interdisciplinary analysis and public review

purposes listed in (2)(a) and (d) of this rule through a similar planning and decision-making process; or

(c) statutory requirements do not allow sufficient time for the agency to prepare an EIS.

(4) The agency may, as an alternative to preparing an EIS, prepare an EA whenever the action is one that might normally require an EIS, but effects which might otherwise be deemed significant appear to be mitigable below the level of significance through design, or enforceable controls or stipulations or both imposed by the agency or other government agencies. For an EA to suffice in this instance, the agency must determine that all of the impacts of the proposed action have been accurately identified, that they will be mitigated below the level of significance, and that no significant impact is likely to occur. The agency may not consider compensation for purposes of determining that impacts have been mitigated below the level of significance.

(5) The agency is not required to prepare an EA or an EIS for the following categories of action:

(a) actions that qualify for a categorical exclusion as defined by rule or justified by a programmatic review. In the rule or programmatic review, the agency shall identify any extraordinary circumstances in which a normally excluded action requires an EA or EIS;

(b) administrative actions: routine, clerical or similar functions of a department, including but not limited to administrative procurement, contracts for consulting services, and personnel actions;

(c) minor repairs, operations, or maintenance of existing equipment or facilities;

(d) investigation and enforcement: data collection, inspection of facilities or enforcement of environmental standards;

(e) ministerial actions: actions in which the agency exercises no discretion, but rather acts upon a given state of facts in a prescribed manner; and

(f) actions that are primarily social or economic in nature and that do not otherwise affect the human environment.

(History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

17.4.608 DETERMINING THE SIGNIFICANCE OF IMPACTS (1) In order to implement 75-1-201, MCA, the agency shall determine the significance of impacts associated with a proposed action. This determination is the basis of the agency's decision concerning the need to prepare an EIS and also refers to the agency's evaluation of individual and cumulative impacts in either EAs or EISs. The agency shall consider the following criteria in determining the significance of each impact on the quality of the human environment:

(a) the severity, duration, geographic extent, and frequency of occurrence of the impact;

(b) the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact that the impact will not occur;

(c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts;

(d) the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values;

(e) the importance to the state and to society of each environmental resource or value that would be affected;

(f) any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision in principle about such future actions; and

(g) potential conflict with local, state, or federal laws, requirements, or formal plans.

(2) An impact may be adverse, beneficial, or both. If none of the adverse effects of the impact are significant, an EIS is not required. An EIS is required if an impact has a significant adverse effect, even if the agency believes that the effect on balance will be beneficial. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

17.4.609 PREPARATION AND CONTENTS OF ENVIRONMENTAL ASSESSMENTS (1) The agency shall prepare an EA, regardless of its length or the depth of analysis, in a manner which utilizes an interdisciplinary approach. The agency may initiate a process to determine the scope of issues to be addressed in an EA. Whenever the agency elects to initiate this process, it shall follow the procedures contained in ARM 17.4.615.

(2) For a routine action with limited environmental impact, the contents of an EA may be reflected on a standard checklist format. At the other extreme, whenever an action is one that might normally require an EIS, but effects that otherwise might be deemed significant are mitigated in project design or by controls imposed by the agency, the analysis, format, and content must all be more substantial. The agency shall prepare the evaluations and present the information described in (3) of this rule as applicable and in a level of detail appropriate to the following considerations:

- (a) the complexity of the proposed action;
- (b) the environmental sensitivity of the area affected by the proposed action;
- (c) the degree of uncertainty that the proposed action will have a significant impact on the quality of the human environment;

- (d) the need for and complexity of mitigation required to avoid the presence of significant impacts.

(3) To the degree required in (2) of this rule, an EA must include:

- (a) a description of the proposed action, including maps and graphs;

- (b) a description of the benefits and purpose of the proposed action. If the agency prepares a cost/benefit analysis before completion of the EA, the EA must contain the cost/benefit analysis or a reference to it;

- (c) a listing of any state, local, or federal agencies that have overlapping or additional jurisdiction or environmental review responsibility for the proposed action and the permits, licenses, and other authorizations required;

- (d) an evaluation of the impacts, including cumulative and secondary impacts, on the physical environment. This evaluation may take the form of an environmental checklist and/or, as appropriate, a narrative containing more detailed analysis of topics and impacts that are potentially significant, including, where appropriate: terrestrial and aquatic life and habitats; water quality, quantity, and distribution; geology; soil quality, stability, and moisture; vegetation cover, quantity and quality; aesthetics; air quality; unique, endangered, fragile, or limited environmental resources; historical and archaeological sites; and demands on environmental resources of land, water, air and energy;

(e) an evaluation of the impacts, including cumulative and secondary impacts, on the human population in the area to be affected by the proposed action. This evaluation may take the form of an environmental checklist and/or, as appropriate, a narrative containing more detailed analysis of topics and impacts that are potentially significant, including where appropriate, social structures and mores; cultural uniqueness and diversity; access to and quality of recreational and wilderness activities; local and state tax base and tax revenues; agricultural or industrial production; human health; quantity and distribution of employment; distribution and density of population and housing; demands for government services; industrial and commercial activity; locally adopted environmental plans and goals; and other appropriate social and economic circumstances;

(f) a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider and a discussion of how the alternative would be implemented;

(g) a listing and appropriate evaluation of mitigation, stipulations, and other controls enforceable by the agency or another government agency;

(h) a listing of other agencies or groups that have been contacted or have contributed information;

(i) the names of persons responsible for preparation of the EA; and

(j) a finding on the need for an EIS and, if appropriate, an explanation of the reasons for preparing the EA. If an EIS is not required, the EA must describe the reasons the EA is an appropriate level of analysis. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

17.4.610 PUBLIC REVIEW OF ENVIRONMENTAL ASSESSMENTS

(1) The level of analysis in an EA will vary with the complexity and seriousness of environmental issues associated with a proposed action. The level of public interest will also vary. The agency is responsible for adjusting public review to match these factors.

(2) An EA is a public document and may be inspected upon request. Any person may obtain a copy of an EA by making a request to the agency. If the document is out-of-print, a copying charge may be levied.

(3) The agency is responsible for providing additional opportunities for public review consistent with the seriousness and complexity of the environmental issues associated with a proposed action and the level of public interest. Methods of accomplishing public review include publishing a news release or legal notice to announce the availability of an EA, summarizing

its content and soliciting public comment; holding public meetings or hearings; maintaining mailing lists of persons interested in a particular action or type of action and notifying them of the availability of EAs on such actions; and distributing copies of EAs for review and comment.

(4) For an action with limited environmental impact and little public interest, no further public review may be warranted. However, where an action is one that normally requires an EIS, but effects that otherwise might be deemed significant are mitigated in the project proposal or by controls imposed by the agency, public involvement must include the opportunity for public comment, a public meeting or hearing, and adequate notice. The agency is responsible for determining appropriate methods to ensure adequate public review on a case by case basis.

(5) The agency shall maintain a log of all EAs completed by the agency and shall submit a list of any new EAs completed to the office of the governor and the environmental quality council on a quarterly basis. In addition, the agency shall submit a copy of each completed EA to the EQC.

(6) The agency shall consider the substantive comments received in response to an EA and proceed in accordance with one of the following steps, as appropriate:

(a) determine that an EIS is necessary;

(b) determine that the EA did not adequately reflect the issues raised by the proposed action and issue a revised document; or

(c) determine that an EIS is not necessary and make a final decision on the proposed action, with appropriate modification resulting from the analysis in the EA and analysis of public comment. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

Rules 17.4.611 through 17.4.614 reserved

17.4.615 DETERMINING THE SCOPE OF AN EIS (1) Prior to the preparation of an EIS, the agency shall initiate a process to determine the scope of the EIS.

(2) To identify the scope of an EIS, the agency shall:

(a) invite the participation of affected federal, state, and local government agencies, Indian tribes, the applicant, if any, and interested persons or groups;

(b) identify the issues related to the proposed action that are likely to involve significant impacts and that will be analyzed in depth in the EIS;

(c) identify the issues that are not likely to involve significant impacts, thereby indicating that unless unanticipated effects are discovered during the preparation of the EIS, the discussion of these issues in the EIS will be limited to a brief presentation of the reasons they will not significantly affect the quality of the human environment; and

(d) identify those issues that have been adequately addressed by prior environmental review, thereby indicating that the discussion of these issues in the EIS will be limited to a summary and reference to their coverage elsewhere; and

(e) identify possible alternatives to be considered. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

17.4.616 ENVIRONMENTAL IMPACT STATEMENTS--GENERAL REQUIREMENTS The following apply to the design and preparation of EISs:

(1) The agency shall prepare EISs that are analytic rather than encyclopedic.

(2) The agency shall discuss the impacts of a proposed action in a level of detail that is proportionate to their significance. For other than significant issues, an EIS need only include enough discussion to show why more study is not warranted.

(3) The agency shall prepare with each draft and final EIS a brief summary that is available for distribution separate from the EIS. The summary must describe:

(a) the proposed action being evaluated by the EIS, the impacts, and the alternatives;

(b) areas of controversy and major conclusions;

(c) the tradeoffs among the alternatives; and

(d) the agency's preferred alternative, if any. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

17.4.617 PREPARATION AND CONTENTS OF DRAFT ENVIRONMENTAL IMPACT STATEMENTS If required by these rules, the agency shall prepare a draft environmental impact statement using an interdisciplinary approach and containing the following:

(1) a description of the proposed action, including its purpose and benefits;

(2) a listing of any state, local, or federal agencies that have overlapping or additional jurisdiction and a description of their responsibility for the proposed action;

(3) a description of the current environmental conditions in the area affected by the proposed action or alternatives, including maps and charts, whenever appropriate. The description must be no longer than is necessary to understand the effects of the action and alternatives. Data analysis must be commensurate with the importance of the impact with less important material summarized, consolidated, or simply referenced;

(4) a description of the impacts on the quality of the human environment of the proposed action including:

(a) the factors listed in ARM 17.4.609(3)(d) and (e), whenever appropriate;

(b) primary, secondary, and cumulative impacts;

(c) potential growth-inducing or growth-inhibiting impacts;

(d) irreversible and irretrievable commitments of environmental resources, including land, air, water and energy;

(e) economic and environmental benefits and costs of the proposed action; and

(f) the relationship between local short-term uses of man's environment and the effect on maintenance and enhancement of the long-term productivity of the environment. When a cost-benefit analysis is prepared by the agency prior to the preparation of the draft EIS, it shall be incorporated by reference in or appended to the EIS;

(5) an analysis of reasonable alternatives to the proposed action, including the alternative of no action and other reasonable alternatives that may or may not be within the jurisdiction of the agency to implement, if any;

(6) a discussion of mitigation, stipulations, or other controls committed to and enforceable by the agency or other government agency;

(7) a discussion of any compensation related to impacts stemming from the proposed action;

(8) an explanation of the tradeoffs among the reasonable alternatives;

(9) the agency's preferred alternative, if any, and its reasons for the preference;

(10) a section on consultation and preparation of the draft EIS that includes the following:

(a) the names of those individuals or groups responsible for preparing the draft EIS;

(b) a listing of other agencies, groups, or individuals who were contacted or contributed information; and

(c) a summary list of source materials used in the preparation of the draft EIS;

(11) a summary of the draft EIS as required in ARM 17.4.616; and

(12) other sections that may be required by other statutes in a comprehensive evaluation of the proposed action, or by the National Environmental Policy Act or other federal statutes governing a cooperating federal agency. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

17.4.618 ADOPTION OF DRAFT ENVIRONMENTAL IMPACT STATEMENT AS FINAL (1) Depending upon the substantive comments received in response to the draft EIS, the draft statement may suffice. The agency shall determine whether to adopt the draft EIS within 30 days of the close of the comment period on the draft EIS.

(2) In the event the agency determines to adopt the draft EIS, the agency shall notify the governor, the environmental quality council, the applicant, if any, and all commentors of its decision and provide a statement describing its proposed course of action. This notification must be accompanied by a copy of all comments or a summary of a representative sample of comments received in response to the draft statement, together with, at minimum, an explanation of why the issues raised do not warrant the preparation of a final EIS.

(3) The agency shall provide public notice of its decision to adopt the draft EIS as a final EIS.

(4) If the agency decides to adopt the draft EIS as the final EIS, it may make a final decision on the proposed action no sooner than 15 days after complying with (1) through (3) of this rule. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

17.4.619 PREPARATION AND CONTENTS OF FINAL ENVIRONMENTAL IMPACT STATEMENT Except as provided in ARM 17.4.618, a final environmental impact statement must include:

(1) a summary of major conclusions and supporting information from the draft EIS and the responses to substantive comments received on the draft EIS, stating specifically where such conclusions and information were changed from those which appeared in the draft;

(2) a list of all sources of written and oral comments on the draft EIS, including those obtained at public hearings, and, unless impractical, the text of comments received by the agency (in all cases, a representative sample of comments must be included);

(3) the agency's responses to substantive comments, including an evaluation of the comments received and disposition of the issues involved;

(4) data, information, and explanations obtained subsequent to circulation of the draft; and

(5) the agency's recommendation, preferred alternative, or proposed decision together with an explanation of the reasons therefor. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

17.4.620 TIME LIMITS AND DISTRIBUTION OF ENVIRONMENTAL IMPACT STATEMENTS (1) Following preparation of a draft EIS, the agency shall distribute copies to the governor, EQC, appropriate state and federal agencies, the applicant, if any, and persons who have requested copies.

(2) The listed transmittal date to the governor and the EQC must not be earlier than the date that the draft EIS is mailed to other agencies, organizations, and individuals. The agency shall allow 30 days for reply, provided that the agency may extend this period up to an additional 30 days at its discretion or upon application of any person for good cause. When preparing a joint EIS with a federal agency or agencies, the agency may also extend this period in accordance with time periods specified in regulations that implement the National Environmental Policy Act. However, no extension which is otherwise prohibited by law may be granted.

(3) In cases involving an applicant, after the period for comment on the draft EIS has expired, the agency shall send to the applicant a copy of all written comments that were received. The agency shall advise the applicant that he has a reasonable time to respond in writing to the comments received by the agency on the draft EIS and that the applicant's written response must be received before a final EIS can be prepared and circulated. The applicant may waive his right to respond to the comments on the draft EIS.

(4) Following preparation of a final EIS, the agency shall distribute copies to the governor, EQC, appropriate state and federal agencies, the applicant, if any, persons who submitted comments on or received a copy of the draft EIS, and other members of the public upon request.

(5) Except as provided by ARM 17.4.618(4), a final decision must not be made on the proposed action being evaluated in a final EIS until 15 days have expired from the date of transmittal of the final EIS to the governor and EQC. The listed transmittal date to the governor and EQC must not be earlier than the date that the final EIS is mailed to other agencies, organizations, and individuals.

(6) All written comments received on an EIS, including written responses received from the applicant, must be made available to the public upon request.

(7) Until the agency reaches its final decision on the proposed action, no action concerning the proposal may be taken that would:

(a) have an adverse environmental impact; or

(b) limit the choice of reasonable alternatives, including the no-action alternative. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

17.4.621 SUPPLEMENTS TO ENVIRONMENTAL IMPACT STATEMENTS

(1) The agency shall prepare supplements to either draft or final environmental impact statements whenever:

(a) the agency or the applicant makes a substantial change in a proposed action;

(b) there are significant new circumstances, discovered prior to final agency decision, including information bearing on the proposed action or its impacts that change the basis for the decision; or

(c) following preparation of a draft EIS and prior to completion of a final EIS, the agency determines that there is a need for substantial, additional information to evaluate the impacts of a proposed action or reasonable alternatives.

(2) A supplement must include, but is not limited to, a description of the following:

(a) an explanation of the need for the supplement;

(b) the proposed action; and

(c) any impacts, alternatives or other items required by ARM 17.4.617 for a draft EIS or ARM 17.4.619 for a final EIS that were either not covered in the original statement or that must be revised based on new information or circumstances concerning the proposed action.

(3) The same time periods applicable to draft and final EISs apply to the circulation and review of supplements. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

Rules 17.4.622 through 17.4.624 reserved

17.4.625 ADOPTION OF AN EXISTING EIS (1) The agency shall adopt as part of a draft EIS all or any part of the information, conclusions, comments, and responses to comments contained in an existing EIS that has been previously or is being concurrently prepared pursuant to MEPA or the National Environmental Policy Act if the agency determines:

(a) that the existing EIS covers an action paralleling or closely related to the action proposed by the agency or the applicant;

(b) on the basis of its own independent evaluation, that the information contained in the existing EIS has been accurately presented; and

(c) that the information contained in the existing EIS is applicable to the action currently being considered.

(2) A summary of the existing EIS or the portion adopted and a list of places where the full text is available must be circulated as a part of the EIS and treated as part of the EIS for all purposes, including, if required, preparation of a final EIS.

(3) Adoption of all or part of an existing EIS does not relieve the agency of the duty to comply with ARM 17.4.617.

(4) The same time periods applicable to draft and final EISs apply to the circulation and review of EISs that include material adopted from an existing EIS.

(5) The agency shall take full responsibility for the portions of a previous EIS adopted. If the agency disagrees with certain adopted portions of the previous EIS, it shall specifically discuss the points of disagreement.

(6) No material may be adopted unless it is reasonably available for inspection by interested persons within the time allowed for comment.

(7) Whenever part of an existing EIS or concurrently prepared EIS is adopted, the part adopted must include sufficient material to allow the part adopted to be considered in the context in which it was presented in the original EIS. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

17.4.626 INTERAGENCY COOPERATION (1) Whenever it is the lead agency responsible for preparation of an EIS, the agency may:

(a) request the participation of other governmental agencies which have special expertise in areas that should be addressed in the EIS;

(b) allocate assignments, as appropriate, for the preparation of the EIS among other participating agencies; and

(c) coordinate the efforts of all affected agencies.

(2) Whenever participation of the agency is requested by a lead agency, the agency shall make a good-faith effort to participate in the EIS as requested, with its expenses for participation in the EIS paid by the lead agency or other agency collecting the EIS fee if one is collected. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

17.4.627 JOINT ENVIRONMENTAL IMPACT STATEMENTS AND EA'S

(1) Whenever the agency and 1 or more other state agencies have jurisdiction over an applicant's proposal or major state actions that individually, collectively, or cumulatively require an EIS and another agency is clearly the lead agency, the agency shall cooperate with the lead agency in the preparation of a joint EIS. Whenever it is clearly the lead agency, the agency shall coordinate the preparation of the EIS as required by this rule. Whenever the agency and 1 or more agencies have jurisdiction over an applicant's proposal or major state actions and lead agency status cannot be resolved, the agency shall request a determination from the governor.

(2) The agency shall cooperate with federal and local agencies in preparing EISs when the jurisdiction of the agency is involved. This cooperation may include, but is not limited to: joint environmental research studies, a joint process to determine the scope of an EIS, joint public hearings, joint EISs, and, whenever appropriate, joint issuance of a record of decision.

(3) Whenever the agency proposes or participates in an action that requires preparation of an EIS under both the National Environmental Policy Act and MEPA, the EIS must be prepared in compliance with both statutes and associated rules and regulations. The agency may, if required by a cooperating federal agency, accede to and follow more stringent requirements, such as additional content or public review periods, but in no case may it accede to less than is provided for in these rules.

(4) The same general provisions for cooperation and joint issuance of documents provided for in this rule in connection with EISs also apply to EAs. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89;

TRANS, from DHES, 1996 MAR p. 1497.)

17.4.628 PREPARATION, CONTENT, AND DISTRIBUTION OF A PROGRAMMATIC REVIEW (1) Whenever the agency is contemplating a series of agency-initiated actions, programs, or policies which in part or in total may constitute a major state action significantly affecting the human environment, it shall prepare a programmatic review discussing the impacts of the series of actions.

(2) The agency may also prepare a programmatic review whenever required by statute, whenever a series of actions under the jurisdiction of the agency warrant such an analysis as determined by the agency, or whenever prepared as a joint effort with a federal agency requiring a programmatic review.

(3) The agency shall determine whether the programmatic review takes the form of an EA or an EIS in accordance with the provisions of ARM 17.4.607 and 17.4.608, unless otherwise provided by statute.

(4) A programmatic review must include, as a minimum, a concise, analytical discussion of alternatives and the cumulative environmental effects of these alternatives on the human environment. In addition programmatic reviews must contain the information specified in ARM 17.4.617 for EISS or ARM 17.4.609 for EAs, as applicable.

(5) The agency shall adhere to the time limits specified for distribution and public comment on EISS or EAs, whichever is applicable.

(6) While work on a programmatic review is in progress, the agency may not take major state actions covered by the program in that interim period unless such action:

- (a) is part of an ongoing program;
- (b) is justified independently of the program; or
- (c) will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program if it tends to determine subsequent development or foreclose reasonable alternatives.

(7) Actions taken under (6) of this rule must be accompanied by an EA or an EIS, if required. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

17.4.629 RECORD OF DECISION FOR ACTIONS REQUIRING ENVIRONMENTAL IMPACT STATEMENTS (1) At the time of its decision concerning a proposed action for which an EIS was prepared, the agency shall prepare a concise public record of decision. The record, which may be integrated into any other documentation of the decision that is prepared by the agency, is a public notice of what the decision is, the reasons for the decision, and any special conditions surrounding the decision or its implementation.

(2) The agency may include in the final EIS, in addition to a statement of its proposed decision, preferred alternative, or recommendation on the proposed action, the other items required by (1) of this rule, and additional explanation as provided for in (3) of this rule. If the final decision and the reasons for that final decision are the same as set forth in the final EIS, the agency may comply with (1) of this rule by preparing a public notice of what the decision is and adopting by reference the information contained in the final EIS that addresses the items required by (1) of this rule. If the final decision or any of the items required by (1) of this rule are different from what was presented in the final EIS, the agency is responsible for preparing a separate record of decision.

(3) There is no prescribed format for a record of decision, except that it must include the items listed in (1) of this rule. The record may include the following items as appropriate:

- (a) brief description of the context of the decision;
- (b) the alternatives considered;
- (c) advantages and disadvantages of the alternatives;
- (d) the alternative or alternatives considered environmentally preferable;
- (e) short and long-term effects of the decision;
- (f) policy considerations that were balanced and considered in making the decision;
- (g) whether all practical means to avoid or minimize environmental harm were adopted, and if not, why not; and
- (h) a summary of implementation plans, including monitoring and enforcement procedures for mitigation, if any.

(4) This rule does not define or affect the statutory decision-making authority of the agency. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

Rules 17.4.630 and 17.4.631 reserved

17.4.632 EMERGENCIES (1) The agency may take or permit action having a significant impact on the quality of the human environment in an emergency situation without preparing an EIS. Within 30 days following initiation of the action, the agency shall notify the governor and the EQC as to the need for the action and the impacts and results of it. Emergency actions must be limited to those actions immediately necessary to control the impacts of the emergency. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

17.4.633 CONFIDENTIALITY (1) Information declared confidential by state law or by an order of a court must be excluded from an EA and EIS. The agency shall briefly state the general topic of the confidential information excluded. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

17.4.634 RESOLUTION OF STATUTORY CONFLICTS (1) Whenever a conflicting provision of another state law prevents the agency from fully complying with these rules the agency shall notify the governor and the EQC of the nature of the conflict and shall suggest a proposed course of action that will enable the agency to comply to the fullest extent possible with the provisions of MEPA. This notification must be made as soon as practical after the agency recognizes that a conflict exists, and no later than 30 days following such recognition.

(2) The agency has a continuing responsibility to review its programs and activities to evaluate known or anticipated conflicts between these rules and other statutory or regulatory requirements. It shall make such adjustments or recommendations as may be required to ensure maximum compliance with MEPA and these rules. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

17.4.635 CONTRACTS AND DISCLOSURE (1) The agency may contract for preparation of an EIS or portions thereof. Whenever an EIS or portion thereof is prepared by a contractor, the agency shall furnish guidance and participate in the preparation, independently evaluate the statement or portion thereof prior to its approval, and take responsibility for its scope and content.

(2) A person contracting with the agency in the preparation of an EIS must execute a disclosure statement, in affidavit form prepared by the agency, specifying that he has no financial or other interest in the outcome of the proposed action other than a contract with the agency. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

17.4.636 PUBLIC HEARINGS (1) Whenever a public hearing is held on an EIS or an EA, the agency shall issue a news release or legal notice to newspapers of general circulation in the area to be affected by the proposed action prior to the hearing. The news release or legal notice must advise the public of the nature of testimony the agency wishes to receive at the hearing. The hearing must be held after the draft EIS has been circulated and prior to preparation of the final EIS. A hearing involving an action for which an EA was prepared must be held after the EA has been circulated and prior to any final agency determinations concerning the proposed action. In cases involving an applicant, the agency shall allow an applicant a reasonable time to respond in writing to comments made at a public hearing, notwithstanding the time limits contained in ARM 17.4.620. The applicant may waive his right to respond to comments made at a hearing.

(2) In addition to the procedure in (1) of this rule, the agency shall take such other steps as are reasonable and appropriate to promote the awareness by interested parties of a scheduled hearing.

(3) The agency shall hold a public hearing whenever requested within 20 days of issuance of the draft EIS by either:

(a) 10% or 25, whichever is less, of the persons who will be directly affected by the proposed action;

(b) by another agency which has jurisdiction over the action;

(c) an association having not less than 25 members who will be directly affected by the proposed action; or

(d) the applicant, if any.

(4) In determining whether a sufficient number of persons have requested a hearing as required by (3) of this rule, the agency shall resolve instances of doubt in favor of holding a public hearing.

(5) No person may give testimony at the hearing as a

representative of a participating agency. Such a representative may, however, at the discretion of the hearing officer, give a statement regarding his or her agency's authority or procedures and answer questions from the public.

(6) Public meetings may be held in lieu of formal hearings as a means of soliciting public comment on an EIS where no hearing is requested under (3) of this rule. However, the agency shall provide adequate advance notice of the meeting; and, other than the degree of formality surrounding the proceedings, the objectives of such a meeting are essentially the same as those for a hearing. (History: 2-3-103, 2-4-201, MCA; IMP, 2-3-104, 75-1-201, MCA; NEW, 1989 MAR p. 226, Eff. 1/27/89; TRANS, from DHES, 1996 MAR p. 1497.)

